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No. 85-78

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

STATE OF ALASKA,
Petitioner,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

AMICI CURIAE BRIEF OF STATES OF CALIFORNIA EX REL. STATE LANDS COMMISSION AND THE STATES OF HAWAII, IDAHO, MINNESOTA, MONTANA, NEVADA, NORTH DAKOTA, OREGON AND WASHINGTON IN SUPPORT OF THE STATE OF ALASKA'S PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether evidence of extensive and longstanding use of a waterway by floatplanes—one of the primary means of commerce utilized on Alaska's extensive system of inland waterways since the time of statehood—for a variety of trade and commercial activities is relevant in determining that state's sovereign title to the waterway's bed.

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Amici curiae States of California ex rel. State Lands Commission and the States of Hawaii, Idaho, Minnesota, Montana, Nevada, North Dakota, Oregon and Washington respectfully file this amici curiae brief in support of the State of Alaska's petition for certiorari in this case. Pursuant to Supreme Court Rule 36.4, consent of the parties to the filing of this brief is not required. This amici curiae brief is timely filed under the provisions of Supreme Court Rule 36.1.

I

INTEREST OF AMICI

Amici's extensive systems of lakes and rivers constitute a vital public resource. The states acquired the beds of their navigable waterways as an incident of sovereignty upon admission to the Union, and hold these lands in trust for the benefit of their citizens. (*Montana v. United States*, 450 U.S. 544, 551-552 (1981); *Martin v. Waddell*, 41 U.S. 367, 410 (1842); *State of California v. Superior Court (Lyon)*, 29 Cal.3d 210, 172 Cal.Rptr. 696 (1981) cert. den., 454 U.S. 865 (1981).) These inland waterways have played a crucial role in the historical development of the American West. They continue to furnish the public with substantial commercial, navigational, recreational and ecological benefits. (See, e.g., *State of California v. Superior Court (Lyon), supra; State of California v. Superior Court (Fogerty)*, 29 Cal.3d 240, 172 Cal.Rptr. 713 (1981), cert. den. 454 U.S. 865 (1981).)

The importance of these waterways is matched by their extensive nature. A recent survey in California, for example, reveals that there are approximately 807 miles of shoreline around navigable lakes and 3,046 miles of shoreline along that state's nontidal navigable rivers. (State Lands Division, *Summary for State-owned Tide and Submerged Lands, Shoreline Mileages,* (May 1972).)

Particularly in recent years, substantial attention has focused on the ownership of the beds of particular inland waterways. This is due in large part to general population increases, migration to previously-undeveloped areas, increased demand for public recreational facilities and the developmental pressures engendered by these other factors. The states, riparian owners and the general public have increasingly turned to the courts to determine their respective rights and obligations concerning Western waterways. A substantial amount of litigation has resulted in both federal and state courts with the principal issue often being who owns the bed

of the waterway in question. This, in turn, leads inevitably to the particular lake or river's navigable status.[1]

Historically, this Court has employed a realistic and practical test of navigability, one in keeping with the realities of the times and consistent with state sovereignty. The decision of the Ninth Circuit Court of Appeals, to the extent it signals a departure from that tradition, will prejudice amici's efforts to perfect their own sovereign ownership claims. Based as it is upon a fundamental misperception of applicable law, the ruling could abrogate amici's sovereign interest in these vital resources.

The importance of sovereign rights attaching to these lands has been recognized repeatedly by Congress. In adopting California's Act of Admission, for example, it declared the State's navigable waterways to be "common highways, and forever free . . . ." (9 Stat. 452; see also Northwest Ordinance of 1787, 1 Stat. 50, 52.) Moreover, their value has consistently been reflected in federal and state case law. (See, e.g., *Montana v. United States, supra,* 450 U.S., 544, 551; *People of the State of California* ex rel. *Younger v. Tahoe Regional Planning Agency,* 516 F.2d 215 (9th Cir. 1975) cert. den. 423 U.S. 868 (1975); *State of California v. Superior Court (Lyon), supra,* 29 Cal.3d 210, 172 Cal.Rptr. 696; *People v. Gold Run Ditch & Mining Co.,* 66 Cal. 138 (1884).)

II

STATEMENT OF CASE

Amici adopt the statement of the case set forth in the State of Alaska's petition for certiorari.

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[1] In California, for example, see *State of California* ex rel. *State Lands Commission v. Yuba Goldfields, Inc.,* 752 F.2d 393 (9th Cir. 1985), pet. for certiorari pending (Yuba River); *Brandenberger et al. v. State of California,* pending in Nevada County Superior Court No. 21947 (Donner Lake).

activities in which the commerce at issue is conducted primarily on the water itself" (*ibid.*). Floatplanes, providing airborne transportation, "are not a mode of conducting commerce on water for the purpose of the test" (*ibid.*). The court expressly rejected petitioner's argument that floatplanes travel on "a continuous joint air-water highway" (*ibid.*), concluding that floatplane activities "are legally irrelevant in making navigability determinations" (*id.* at C8).

The district court denied petitioner's request for interlocutory appeal certification (Pet. App. A3), see 28 U.S.C. 1292(b). Petitioner then waived "any claim to the 'navigability of Slopbucket Lake independent of the activities of floatplanes' " (Pet. App. A3) and the court entered final judgment in favor of all defendants (*id.* at D-1). Petitioner appealed and the court of appeals affirmed under much the same reasoning employed by the district court.

Like the district court, the court of appeals placed central reliance on *The Daniel Ball* (Pet. App. A4-A5), agreeing that "use of Slopbucket Lake by floatplanes * * * is insufficient as a matter of law to render the lake navigable for purposes of title" (*id.* at A8).[3] The court specifically considered and rejected petitioner's contention that, because floatplanes "are a mode of commerce that operates partially on water," floatplane use established navigability as a matter of law (*id.* at A5). The court also considered *The Montello,* 87 U.S. (20 Wall.) 430, 441-442 (1874), where this Court stated that a river is "navigable in fact * * * [i]f it [is]

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[3]The court's original opinion referred to "use of Slopbucket Lake by floatplanes and related incidental watercraft" (Pet. App. A8). On May 3, 1985, the court granted petitioner's motion to amend the opinion by deleting the words "and related incidental watercraft." See *id.* at B1. The amendment is misprinted in the reported decision, which states that "use of Slopbucket Lake by floatplanes and [sic] is insufficient as a matter of law to render the lake navigable for purposes of title." 754 F.2d at 855.

capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted * * *." The court of appeals noted that *The Montello* refused to limit navigability to waterways open only to steam or sail vessels, permitting a determination of navigability based on the use of shallow draft Durham boats propelled by animal power (Pet. App. A5). The court of appeals nevertheless observed (*ibid.*) that:

> the crux of the test is still the requirement that the body of water be susceptible of use as a highway or channel for commerce on water. *Utah* v. *United States,* 403 U.S. at 11. This necessarily involves the utilization of the waterway as a path between two points.

Stating that "the central theme remains the movement of people or goods from point to point on the water" (Pet. App. A6), the court of appeals rejected petitioner's assertion that, because Slopbucket Lake is an integral part of an "air and water highway" over which floatplanes travel, it should be deemed navigable for purposes of determining title. Instead, the court characterized the lake as "a terminus or launching point for floatplanes, not 'a *channel* for useful commerce' " (Pet. App. A6; quoting *United States* v. *Holt State Bank,* 270 U.S. 49, 56 (1926) (emphasis supplied by the court)). In short, floatplanes were held insufficient as a matter of law to render Slopbucket Lake navigable for purposes of title because "floatplanes go to and from the lake; they do not travel on the water" (*ibid.*).

ARGUMENT

The decision of the court of appeals is plainly correct. It does not conflict with any decision of this Court or any other court of appeals. Nor will such a conflict arise in the future since the Ninth Circuit exercises appellate jurisdiction over federal cases from Alaska and Hawaii, the only

states in which the issue can arise.[4] Accordingly, there is no warrant for this Court's review.

1. Petitioner contends (Pet. 8-10) that the court of appeals' holding miscontrues the federal test for navigability and is inconsistent with prior decisions of this Court. Petitioner is plainly mistaken. The court of appeals' decision is based squarely on *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1870), which provides:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Lakes that simply provide an arrival and departure point for airborne traffic are not "highways" for "the customary modes of trade and travel on water." Such lakes serve as runways rather than highways, supporting traffic through the air rather than on water. Petitioner's contentions to the contrary toss familiar and well established principles of navigability to the wind.

The court of appeals correctly observed that the characterization of a waterway as a highway "necessarily involves the utilization of the waterway as a path between two points" (Pet. App. A5). Indeed, a finding of navigability is invariably based upon trade or travel conducted between two points upon the waters' surface. See, *e.g., Utah* v.

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[4]Navigability, for purposes of ascertaining whether a state has title to submerged lands, is determined as of the date of statehood. *Utah* v. *United States,* 403 U.S. 9, 9-10 (1971). As petitioner recognizes (Pet. 12), Hawaii is the only other state admitted to the Union since the commercial development of floatplanes.

United States, 403 U.S. 9, 11 (1971) (transportation of livestock between the shores and islands of the Great Salt Lake); *United States* v. *Appalachian Electric Power Co.,* 311 U.S. 377, 411 (1940) (transportation of various products between points on the New River); *United States* v. *Holt State Bank,* 270 U.S. 49, 57 (1926) (transportation of goods between points on Mud Lake); *State of Oregon* v. *Riverfront Protection Ass'n,* 672 F.2d 792, 795 (9th Cir. 1982) (transportation of logs down the McKenzie River).[5] The court of appeals properly recognized that surface transportation on the waterway represents "the gist of the federal test." *Utah,* 403 U.S. at 11.

Petitioner contends (Pet. 9) that floatplane use satisfies the navigability test because floatplanes are used for commercial purposes. Petitioner's sole support for this proposition is *The Montello,* 87 U.S. (20 Wall.) 430, 442 (1874), which recognizes that traffic by vessels "of any kind that can float upon the water" may provide evidence of navigability. That dictum, read in context, does not support petitioner's position that floatplane use conclusively establishes navigability. Indeed, that statement plainly referred only to

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[5]Notably, the requirement that trade or travel be conducted across or along a water body has heretofore prompted courts to find small, isolated lakes such as Slopbucket Lake to be non-navigable. See, *e.g., State* v. *Bollenbach,* 241 Minn. 103, 120, 63 N.W.2d 278, 289 (1954); *Monroe* v. *State,* 111 Utah 1, 6, 175 P.2d 759, 762 (1946); *Proctor* v. *Sim,* 134 Wash. 606, 611, 236 P. 114, 116 (1925). In the only prior case directly addressing the relevance of floatplanes in determining navigability for title, the court rejected the argument that floatplane use could render a small lake navigable. *Snively* v. *State,* 167 Wash. 385, 389, 9 P.2d 773, 774-775 (1932). A conclusion that floatplane use renders a lake navigable would result in a marked departure from presently uniform law. Moreover, it would vest Alaska, alone among the states, with title to the beds of small, isolated lakes. That result would contravene the Equal Footing Doctrine's express purpose of assuring equal treatment among the original and newly admitted states. See *Pollard* v. *Hagan,* 44 U.S. (3 How.) 212, 223, 228-229 (1845).

traffic by waterborne vessels. See 87 U.S. (20 Wall.) at 442; see also *id.* at 443 ("the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce").[6]

The court of appeals' decision expressly recognizes what is implicit in *The Montello* and numerous other cases governing navigability determinations—that the federal navigability test is based upon waterborne transportation from point to point upon the waters' surface. See, *e.g.*, *United States* v. *Oregon*, 295 U.S. 1, 21-24 (1935); *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 86 (1922). The decision does not constitute a "departure from the well-established precedents of this Court" (Pet. 10); rather, it represents the correct application of familiar principles of federal law. Neither this Court nor the courts of appeals have ever suggested that the federal test for navigability is satisfied, as a matter of law, by the fleeting and tangential contacts of floatplanes that light upon the waters' surface.

2. Petitioner further argues (Pet. 10-13) that this Court should review the court of appeals' decision because it has potentially momentous consequences for Alaska. It is certainly true that petitioner might profit handsomely from its suggested change in the established test for determining title

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[6]As the district court emphasized (Pet. App. C7) and petitioner does not dispute, "[a]ll the previously recognized modes of conducting commerce in determining navigability for title involve either vessels or activities in which the commerce at issue is conducted primarily on the water itself." The lower courts' emphasis on the waterborne characteristics of commercial traffic is consistent with *The Daniel Ball's* reference to "customary modes of trade and travel *on water*." *The Daniel Ball*, 77 U.S. (10 Wall.) at 563 (emphasis added). Indeed, just as incidental use of a water body by a floatplane for takeoffs and landings fails to satisfy the "highway for commerce" prerequisite, the fact that floatplanes are primarily airborne establishes that they are not a customary mode of trade and travel on water.

to submerged lands.[7] But grand expectations do not add merit to far-fetched arguments. The fact that petitioner would stand to gain ownership of thousands, and perhaps millions, of acres of lakebed property does not support review of what are, at bottom, insubstantial claims.[8]

Petitioner's assertion (Pet. 11) that the court of appeals' decision will affect public use of Alaskan waterways for transportation and commerce is, at best, doubtful. The decision addresses the federal standard, expressed in *The Daniel Ball,* for determining ownership of submerged lands. It does not impair petitioner's sovereign power to regulate, within constitutional limits, the use of water resources within its borders. See *Sporhase* v. *Nebraska,* 458 U.S. 941, 954 (1982).[9] Furthermore, the transfer of

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[7]The district court noted (Pet. App. C6 n.5) "[t]here are over three million lakes in Alaska and a great number of them are accessible by floatplane." Lakes located throughout Alaska, including lakes in the midst of native landholdings and federal parks and refuges, could be deemed navigable under petitioner's position solely by virtue of susceptibility to floatplane use. By radically expanding the definition of navigability for title purposes, petitioner would stand to gain considerable benefits from the control over and use of mineral resources in those lake beds. For example, the oil-rich North Slope of Alaska embraces countless small, isolated lakes.

[8]Petitioner also asserts (Pet. 12) that the effect of the court of appeals' decision may not be limited to Alaska (and, presumably, Hawaii) in light of the court's requirement that the transportation in question be conducted from point to point on the body of water. Petitioner argues that the decision could affect navigability decisions "where rivers and lakes often serve as only one portion of the route of travel" (*ibid.*). This contention is meritless. The court of appeals carefully limited its decision to a conclusion "that use of Slopbucket Lake by floatplanes is insufficient as a matter of law to render the lake navigable for purposes of title" (Pet. App. B1).

[9]The Alaska Constitution states that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Alaska Const. Art. VIII, § 3. See also Alaska Stat. § 46.15.030 (1982). In light of these constitutional and statutory provisions,

submerged lands to native corporations under the ANCSA will not defeat public use of lakes for transportation. The ANSCA contains specific reconveyance and public easement provisions to assure that the public can travel throughout Alaska despite the transfer of federal land holdings to native corporations.[10] Indeed, the BLM designated Slopbucket Lake a "major waterway" under the public easement provisions. Accordingly, two one-acre sites have been reserved along the shores of Slopbucket Lake and adjoining Iliamna Lake to provide protected areas for floatplanes.[11]

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the district court in *Alaska Public Easement Defense Fund* v. *Andrus*, 435 F. Supp. 664, 677 (D. Alaska 1977), held that "the people of the State have the right to use the water itself on non-navigable rivers and streams." See *Wernberg* v. *State*, 516 P.2d 1191, 1198-1199 (Alas. 1973) ("the provisions in article VIII [of the Alaska Constitution] were intended to permit the broadest possible access to and use of state waters by the general public"); see also MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 Fla. St. U. L. Rev. 511, 605 (1975).

[10]Under the ANCSA's reconveyance provisions, 43 U.S.C. 1613(c), native village corporations must reconvey selected lands that fall under designated categories, including "the surface estate for airport sites, airway beacons, and other navigation aids as such existed on December 18, 1971, together with such additional acreage and/or easements as are necessary to provide related governmental services and to insure safe approaches to airport runways * * *." 43 U.S.C. 1613(c)(4). See also 43 U.S.C. 1613(c)(3). The public easement provisions provide for the reservation of public easements across lands conveyed to native corporations at periodic points along "major waterways." See 43 U.S.C. (1976 ed.) 1616(b); 43 C.F.R. 2650.4-1. See also 43 U.S.C. 1616 note.

[11]Petitioner argues (Pet. 4) that BLM's classification of Slopbucket Lake as a "major waterway," which is defined in 43 C.F.R. 2650.0-5(o) to include any lake which has significant use in its liquid state by boats or floatplanes for access to publicly owned lands or between communities, conflicts with its administrative determination that the lake is non-navigable. However, that argument is plainly meritless. The contention that the term "major waterways" in 43 U.S.C. (1976 ed.)

3. Finally, petitioner asserts (Pet. 13-14) that the entry of summary judgment was in error since navigability is a question of fact. However, the question before the court—whether floatplane use is sufficient as a matter of law to render Slopbucket Lake navigable—raised no unresolved issues of fact. Indeed, it was petitioner that elected to move for summary judgment relying *solely* on floatplane use to establish navigability. The federal defendants' motion for partial summary judgment accepted, arguendo, petitioner's allegations regarding the use of Slopbucket Lake by floatplanes, but maintained that floatplane use, standing alone, was insufficient as a matter of law to prove title. The district court agreed, ruling that "floatplane activities on Slopbucket Lake are not modes of conducting commerce on water for the purpose of determining navigability for title" (Pet. App. C8). Petitioner then expressly "waived any claim to the 'navigability of Slopbucket Lake independent of the activities of floatplanes' " (Pet. App. A3). Petitioner's waiver resolved any remaining factual issues concerning the navigability of Slopbucket Lake and the district court accordingly entered judgment against petitioner (*ibid.*). Thus, the court of appeals could properly rule that "use of Slopbucket Lake by floatplanes * * * is insufficient as a matter of law to render the lake navigable for purposes of title" (Pet. App. A8).[12]

1616(b)(1) should be deemed the equivalent of "navigable waterways" was properly rejected in *Alaska Public Easement Defense Fund* v. *Andrus*, 435 F. Supp. 664, 678 (D. Alaska 1977).

[12]Petitioner's assertion (Pet. 13) that it was never provided an opportunity to present evidence on all the facts regarding floatplane use is disproved by its own admission (Pet. 14) that its motion for summary judgment was accompanied by "a wealth of undisputed information regarding the use of floatplanes on Slopbucket Lake and on the use and importance of floatplanes in Alaska." The district court and court of appeals accepted this information as true for purposes of ruling on the legal relevance of floatplanes in title navigability determinations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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